

SUPREME COURT OF QUEENSLAND

REGISTRY: Brisbane  
NUMBER: BS3508/2015

IN THE MATTER OF LM INVESTMENT MANAGEMENT LIMITED (IN LIQUIDATION)  
(RECEIVERS AND MANAGERS APPOINTED)  
ACN 077 208 461

First Applicant: JOHN RICHARD PARK AND GINETTE DAWN MULLER AS LIQUIDATORS  
OF LM INVESTMENT MANAGEMENT LIMITED (IN LIQUIDATION)  
(RECEIVERS AND MANAGERS APPOINTED) ACN 077 208 461 THE  
RESPONSIBLE ENTITY OF THE LM FIRST MORTGAGE INCOME FUND  
ARSN 089 343 288

AND

Second Applicant: LM INVESTMENT MANAGEMENT LIMITED (IN LIQUIDATION)  
(RECEIVERS AND MANAGERS APPOINTED) ACN 077 208 461 THE  
RESPONSIBLE ENTITY OF THE LM FIRST MORTGAGE INCOME FUND  
ARSN 089 343 288

AND

Respondent: DAVID WHYTE AS THE PERSON APPOINTED TO SUPERVISE THE  
WINDING UP OF THE LM FIRST MORTGAGE INCOME FUND ARSN 089  
343 288 PURSUANT TO SECTION 601NF OF THE CORPORATIONS ACT  
2001

AFFIDAVIT OF DAVID WHYTE

I, DAVID WHYTE of C/- BDO, Level 10, 12 Creek Street, Brisbane in the State of Queensland, Official  
Liquidator, state on oath:-

1. I am an Official Liquidator and a Partner of the firm BDO.
2. This affidavit is sworn in response to:-

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Signed: 

Witnessed by: 

AFFIDAVIT:  
Form 46, R.431

TUCKER & COWEN  
Solicitors  
Level 15  
15 Adelaide Street  
Brisbane, Qld, 4000.  
Tele: (07) 300 300 00  
Fax: (07) 300 300 33

Filed on behalf of the Respondent

- (a) The Further Amended Originating Application (“FAOA”) filed by the First and Second Applicants (“the Applicants”) on 16 December 2015, and listed for hearing in this Honourable Court on 22 February 2016; and
  - (b) The affidavit of John Richard Park, the liquidator (together with Ms Ginette Muller) of LM Investment Management Limited (“LMIM”) the Responsible Entity (“RE”) of the LM First Mortgage Income Fund (“FMIF”), sworn and filed on 28 January 2016 in this proceeding, which I have read (“the affidavit of Mr Park” or “the affidavit”).
3. I have previously sworn an affidavit which has been filed in this proceeding; that affidavit, with exhibit “DW-1”, was sworn and filed on 12 July 2015 (“my July affidavit”).

**Notice of issues as to the remuneration of FTI**

4. On 11 January 2016 and 25 January 2016, I instructed my solicitors, Tucker & Cowen, to write to Russells Lawyers, the solicitors for the Applicants, identifying aspects of the FAOA with which I had concerns. Copies of those letters are referred to below.

**Part 1 - Summary of remuneration paid across appointments and entities**

5. The FAOA seeks from the FMIF, the following amounts of remuneration (exclusive of GST):-

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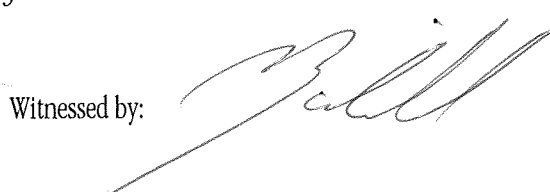
*Liquidators' Remuneration*

Date	Category 1 Remuneration	Category 2 Remuneration
1 August 2013 to 30 August 2013	\$340,086.59	\$98,022.91
1 September 2013 to 30 September 2013		\$62,837.13
1 October 2013 to 31 October 2013		\$38,239.55
1 November 2013 to 30 November 2013		\$24,749.86
1 December 2013 to 31 December 2013		\$11,313.73
1 January 2014 to 30 March 2014	\$158,666.40	\$48,096.69
1 April 2014 to 30 June 2014		\$44,987.41
1 July 2014 to 30 September 2014	\$209,869.75	\$34,339.70
1 October 2014 to 31 December 2014		\$26,775.68
1 January 2015 to 30 June 2015		\$63,762.36
1 July 2015 to 30 September 2015	\$30,700.57	\$28,354.09
<b>SUBTOTAL</b>	<b>\$739,323.31</b>	<b>\$481,479.11</b>
	<b>TOTAL</b>	<b>1,220,802.42</b>

*Administration Remuneration*

Date	Category 1 Remuneration	Category 2 Remuneration
19 March 2013 to 12 April 2013	\$1,092,133.73	\$193,594.80
13 April 2013 to 30 June 2013		\$462,572.06
30 June 2013 to 31 July 2013		\$129,148.82
<b>SUBTOTAL</b>	<b>\$1,092,133.73</b>	<b>\$785,315.68</b>
	<b>TOTAL</b>	<b>\$1,877,449.41</b>

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*Remuneration Total*

Remuneration	Category 1 Remuneration	Category 2 Remuneration	TOTAL
Liquidators'	\$739,323.31	\$481,479.11	\$1,220,802.42
Administration	\$1,092,133.73	\$785,315.68	\$1,877,449.41
<b>TOTAL</b>	<b>\$1,831,457.04</b>	<b>\$1,266,794.79</b>	<b>\$3,098,251.83</b>

6. Mr Park does not set out in his affidavit the full extent of remuneration that has been paid to him and Ms Muller as the administrators or liquidators of LMIM and/or LMIM itself.
7. Exhibited hereto and marked "DW-2" is a copy of the Form 524 Presentation of Accounts and Statement signed by Mr Park with respect to the liquidation of LMIM on 17 August 2015.
8. The Form 524 states that, for the period of the liquidation of LMIM beginning on 1 August 2013, Mr Park and Ms Muller have been paid remuneration of \$1,220,159.88.
9. I have also received 'Administration Indemnity Claims' from FTI Consulting in the order of \$616,000. These were provided to me for my consideration pursuant to the regime established by Justice Jackson in the orders made 17 December 2015, and relate to expenses incurred by Mr Park and Ms Muller as administrators and/or liquidators of LMIM in its capacity as RE of the FMIF.

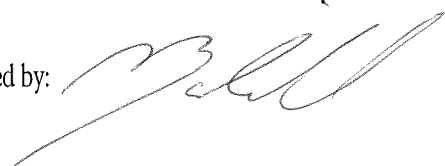
*MPF Proceedings (Supreme Court proceeding number 11593 of 2013)*

10. By Order of this Honourable Court on 10 February 2014, KordaMentha Pty Ltd (**KordaMentha**) was justified in having agreed to pay Mr Park and Ms Muller the amount \$1,679,000 with respect to their claim for indemnity from the MPF. The amount initially claimed by Mr Park and Ms Muller in these proceedings was approximately \$2.2 million dollars.
11. KordaMentha's section 96 statement filed in that proceeding refers to a total amount claimed of \$406,522 for administrators' professional fees, plus a proportion of \$302,968 in "general

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*professional fees* incurred in administering LMIM (as the former trustee), of which a portion was apportioned to the MPF.

12. It is not apparent to me from the content of Mr Park's Affidavit if this has been accounted for in terms of the remuneration claimed in this application, nor whether the apportionment based on a percentage allocation between the funds has been applied consistently.
13. The affidavit of Mr Park states, at paragraph 68, that an amount of \$278,522.49 was allocated to the MPF for the period ending 12 April 2013. I understand this to mean that \$278,522.49 was allocated in Category 2 remuneration, however this does not seem to accord with the section 96 statement.
14. Exhibited hereto and marked "DW-3" is a copy of the section 96 statement filed in that proceeding, and the Orders of Justice Martin dated 10 February 2014.

*Remuneration as administrators of LMA*

15. Exhibited hereto and marked:-
  - (a) "DW-4" is a copy of the "*Minutes of Meeting of Committee of Creditors*" held at 9.30am on 26 July 2013 and filed by Ms Muller with the Australian Securities and Investment Commission ("ASIC") on 5 August 2013; and
  - (b) "DW-5" is a copy of the "*Minutes of Second Meeting of Creditors*" held 11.00am on 26 July 2013 and filed by Ms Muller with the Australian Securities and Investment Commission on 5 August 2013,  
  
herein referred to together as "the Minutes".
16. The Minutes state that remuneration of the Administrators Mr Park and Ms Muller for work in the administration of LMA, was approved in the amounts of:-
  - (a) For the period 19 March 2013 to 30 June 2013, \$706,464.77 (inclusive of GST); and

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- (b) For the period 1 July 2013 to 26 July 2013, \$154,000 (inclusive of GST).
17. It does not appear that these amounts have been paid. The Form 524 Presentation of Accounts and Statement submitted by Ms Muller on 2 September 2013, records that, no remuneration was paid to the administrators in the period of their appointment from 19 March 2013 to 31 July 2013.
18. Exhibited hereto and marked "DW-6" is a copy of Form 524 Presentation of Accounts and Statement signed by Ms Muller for the period of the administration of LMA.
19. I am unaware of the position of Mr David Clout, the liquidator of LMA as to payment of remuneration to Mr Park and Ms Muller and whether any claim has been made or is intended to be made by the liquidator of LMA for payment of any amount from LMIM in respect of amounts representing their remuneration, on the basis that it should be indemnified from the FMIF. I have not, at the date of this Affidavit, been notified of any such claim by Mr Clout.
20. If the FMIF was to pay an amount representing any portion of the remuneration of Mr Park and Ms Muller in administering LMA, in my opinion this money would appropriately first be paid to the liquidator of LMA, and for those funds to be dealt with by the liquidator in the ordinary course of priorities pursuant to the *Corporations Act*.
21. As to this, I have received from the Applicants an invoice from LMA to LMIM as responsible entity for the FMIF, for loan management fees of \$252,310.87, which has not been paid.

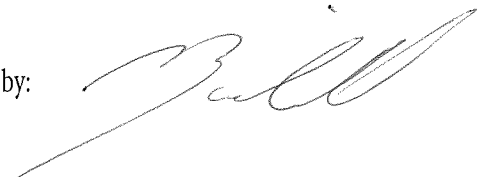
*Remuneration previously approved by creditors of LMIM*

22. The remuneration of Mr Park and Ms Muller in acting as administrators of LMIM for the periods 19 March 2013 to 30 June 2013, and 1 July 2013 to 31 July 2013, were approved at meetings of the Committee of Creditors/second meeting of creditors of LMIM respectively. At paragraph 52, Mr Park raises a question as to the propriety of a meeting of creditors of LMIM approving the remuneration of administrators, and approving that sum to be drawn from the Funds (including the FMIF). I share Mr Park's concern as to the propriety of relying on that approval. Remuneration paid from the assets of the FMIF, should in my view ultimately be proven as

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properly payable for work in the realisation and preservation of the assets of the FMIF, if it is to be claimed directly from the assets of the FMIF.

*Controllership Remuneration*

23. At paragraphs 38 and 39 of the affidavit, Mr Park notes that Category 3 remuneration, that is, the remuneration following the appointment of LMIM as a controller over the various security rights of borrowers from the FMIF, has been paid, and not included as part of the FAOA.

24. Exhibited hereto and marked "DW-7" is a copy of the Form 524 Presentation of Accounts and Statement lodged by FTI on 20 October 2014 for LMIM in its capacity as controller of:-

(a) Cameo Estates Lifestyle Villages (Launceston) Pty Ltd (Receivers and Managers Appointed) (Controllers Appointed) ACN 098 955 296;

(b) Bridgewater Lake Estate Pty Limited (In Liquidation) (Controllers Appointed) ACN 086 203 787;

(c) OVST Pty Ltd (Controllers Appointed) (In Liquidation) ACN 103 216 771;

(d) Redland Bay Leisure Life Pty Ltd (In Liquidation) (Controllers Appointed) ACN 109 932 916;

(e) Redland Bay Leisure Life Development Pty Ltd (In Liquidation) (Controllers Appointed) ACN 112 002 383; and

(f) Pinevale Villas Morayfield Pty Ltd (In Liquidation) (Controllers Appointed) ACN 116 192 780;

(the **Controllership Entities**)

25. Exhibited hereto and marked "DW-8" are copies of invoices paid to LMIM as controller of the Controllership Entities.

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*Accounts and statements presented by the DB Receivers*

26. Exhibited hereto and marked "DW-9" is a copy of the Form 524 Presentation of Accounts and Statement lodged by the DB Receivers on 10 August 2015.

**Part 2 - Category 1 Remuneration**

*Quantum of remuneration following the appointment of the DB Receivers and myself*

27. I refer to paragraphs 80 to 92 of the affidavit of Mr Park. These paragraphs relate to Category 1 remuneration for which a determination, and approval, is sought for payment from the FMIF.
28. On the basis of the breakdown of remuneration provided in the affidavit of Mr Park, Mr Park and Ms Muller seek approval of remuneration as follows:-
- (a) In the period from the appointment of McGrathNicol on 11 July 2013, to my appointment on 8 August 2013, \$252,883.00;
  - (b) From the period of my appointment to 31 December 2013, the amount of \$291,972.00; and
  - (c) From 31 December 2013 to 30 September 2015, \$399,236.72.
29. In total, Mr Park and Ms Muller seek remuneration in Category 1 for work directly attributable to the FMIF in the sum of \$944,091.72 after the appointment of the DB Receivers and me (of the total \$1,759,445.36 sought since their appointment on 19 March 2013).
30. I refer to the schedules of Category 1 time that appear at pages 594 to 603 of exhibit JRP-1 to Mr Park's affidavit ("Category 1 Schedules"), which provide a general categorisation of the work performed.
31. Due to the time and cost involved I have not engaged in a detailed line-by-line review of the narrations with respect to Category 1 remuneration; however, having regard to the relevant

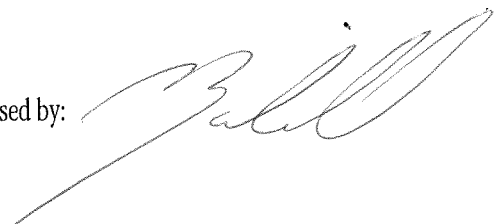
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Witnessed by:





paragraphs of the affidavit of Mr Park, and my inspection of the narrations contained at pages 611 to 678 of exhibit "JRP-1", I cannot determine:-

- (a) The work which has been done, for example, which statutory obligations of the RE resulted in time being charged to the FMIF; what budgets and strategic overviews did the RE prepare, and (subject to what is said below in connection with the proceedings resulting in the judgment of Dalton J) what litigation was the RE involved in, and charged to the FMIF;
- (b) The functions being carried out by Mr Park and Ms Muller in realising and preserving the assets of the FMIF following the appointment of the DB Receivers, and me;
- (c) Why this work was necessary for the preservation and realisation of the assets of the FMIF; and
- (d) What the benefits to the members of the FMIF were from the work which is said to have been carried out for this purpose.

32. It is not clear to me what role Mr Park and Ms Muller were seeking to carry out in relation to the realisation of FMIF assets, and the benefit received by the members of the FMIF for the quantum of remuneration sought after the appointments of the DB Receivers and me. The remuneration sought in Category 1 seems to be disproportionate to any work that would have been necessary for them to carry out.

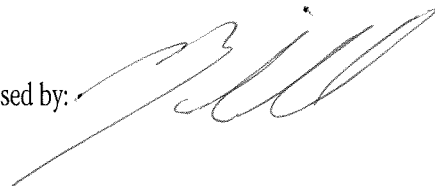
33. In the period of remuneration covered by the FAOA, my remuneration, and that of the DB Receivers, was principally concerned with the realisation of the assets of the FMIF (my most recent remuneration application of course being more concerned with carrying on litigation on behalf of the FMIF).

34. I refer to the Category 1 Schedules and, in particular, to the section for "Loan Book Management". An amount of \$63,932 has been included in that section for the period after 31 December 2013; an additional amount of \$115,785.50 relates to the period from 8 August 2013 to

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31 December 2013. During that period, the DB Receivers were appointed to the FMIF and, for the most part of that period, I was also appointed as the Court-appointed Receiver of the FMIF.

35. It appears from a review of the summary of the work performed that some of this amount is made up of the applicants approving invoices for payment at the fund level, and insofar as it was with the DB Receivers agreement, I accept that an amount will be properly payable.

*Time charged by Mr John Corbett*

36. Paragraph 92 of the affidavit of Mr Park refers to the time charged by Mr John Corbett, said to be a former consultant of FTI, turned employee with respect to the FMIF. Mr Corbett recorded weekly entries of time for the period 19 March 2013 to 31 May 2013. The work that Mr Corbett undertook is not detailed and it is therefore not apparent why it was necessary or how it was for the benefit of the FMIF. As Mr Corbett's time entries are recorded as large multiple-hour entries, no useful review of these can be carried out. The agreement between Mr Park and Ms Muller, and Mr Corbett (to the extent such agreement exists), has not been exhibited to the affidavit of Mr Park.
37. Whilst Mr Corbett during the period 19 March 2013 to 31 May 2013, provided weekly time entries at the rate of \$190 per hour, in the narrations of work thereafter, Mr Corbett was employed by FTI and billed at the rate of \$550 per hour thereafter.

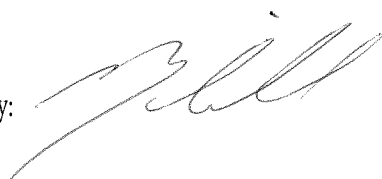
*Remuneration with respect to the trial before Justice Dalton*

38. I refer to Supreme Court proceeding number 3383 of 2013.
39. By order of this Honourable Court made on 8 August 2013 and later embodied in an Order dated 21 August 2013, I was appointed, *inter alia*, to take responsibility to wind up the FMIF pursuant to its Constitution.
40. On 20 December 2013, Justice Dalton made further Orders, following a hearing as to costs on 6 September 2013. Exhibited hereto and marked "DW-10" is a copy of those orders.
41. Justice Dalton ordered that the First Respondent (LMIM):-

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*“be indemnified from the FMIF only to the extent of 20 percent of its costs of and incidental to this proceeding, excluding any reserved costs.”*

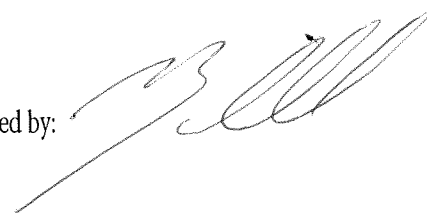
42. The costs order was not appealed.
43. The affidavit of Mr Park does not state the proportion of the remuneration in Category 1 that he and Ms Muller are seeking in respect to work performed by them, and employees of FTI, in relation to the trial before Justice Dalton.
44. On 14 August 2014, Mr Park wrote to me (a copy of this letter is located at exhibit “JRP-1”, page 370) in regard to his and Ms Muller’s claim for remuneration and expenses for the period 19 March 2013 to 31 December 2014.
45. I assume that the amount sought includes all work done. With respect to the proceeding before Justice Dalton, at page 6 of that letter, Mr Park states that:-
- “Our time incurred in relation to the proceedings leading to your appointment have been included in full.”*
46. Although it appears likely that the entirety of that work is sought for approval by the FAOA, I do not know the amount of that remuneration, nor whether it should be reduced in accordance with Justice Dalton’s orders of 20 December 2013.
47. The Category 1 Schedules refer to a section for “Litigation”. I observe that almost all, if not all, of the items that appear in that section, identified as items F1 to F9, appear to relate to the proceeding that resulted in the Orders of Justice Dalton, and possibly the appeal from those Orders. I observe that the Category 1 Schedules record a total value of remuneration relating to “Litigation” for the period from 19 March 2013 to 30 June 2014 of \$262,678.

*Expenses*

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48. In paragraphs 26 (c) and 26 (f) of the affidavit, Mr Park states that the FAOA seeks approval for the payment of expenses incurred by him and Ms Muller as administrators and liquidators, as the case may be, insofar as they relate to the FMIF, from the property of the FMIF.
49. These expenses appear to be properly subject to the regime established by His Honour Justice Jackson in the Orders made 17 December 2015, which includes provision for such expenses to be provided to me by way of an 'Eligible Claim' and the material served on me does not state any reason why the regime established by his Honour's Order should not be followed.

*Set-off*

50. There may be a set off against any indemnity claimed by LMIM.
51. I have filed one proceeding in the Supreme Court of Queensland (12317 of 2014) for the loss suffered by the FMIF, against LMIM, the trustee of the MPF and six directors and/or former directors of LMIM.
52. Further, on 17 February 2016, I instructed my solicitors, Gadens, to write to the solicitors for LMIM, with respect to several possible claims I may have as against LMIM in its capacity as RE of the FMIF.
53. Exhibited hereto and marked "DW-11" is a copy of the letter from Gadens to Russells dated 17 February 2016.

**Part 3 - Category 2 Remuneration**

*Indemnity of LMIM for work as RE*

54. The affidavit of Mr Park does not readily identify, in detail, the nature of work said to account for the Category 2 remuneration. Insofar as it relates to work done by LMIM or LMA it would appear to be a claim that relies on LMIM's right of indemnity from the FMIF.

*Remuneration for winding up LMIM*

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55. For the period of the liquidation of LMIM beginning on 1 August 2013, Mr Park and Ms Muller have been paid remuneration of \$1,220,159.88 (see exhibit "DW-2" above).

56. In paragraph 26(a) of the affidavit, Mr Park states that this application seeks to resolve:-

*"the determination of the quantum of the administrators' and liquidators' remuneration generally and insofar as it relates to each of the Funds (aside from the MPF)."*

57. In the Form 524 *Presentation of Accounts and Statement* lodged by Mr Park on 19 August 2015 (above at "DW-2"), are statements to the effect that:-

(a) There have been total receipts in the winding up of approximately \$5.5 million; and

(b) There is approximately \$1.45 million cash at bank.

58. The Form 524 lodged by Ms Muller for the period of administration (above at "DW-6") also reveals that there were three significant asset realisations available in the winding up of LMIM, totalling approximately \$2.2 million:-

(a) Cash at bank of \$1,053,283;

(b) Sale of land of \$491,549; and

(c) Sale of Joint Venture interests of \$655,096.

*The quantum of remuneration*

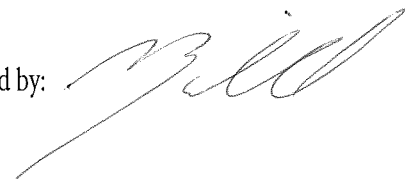
59. Mr Park seeks remuneration in the amount of \$1,266,794.70 for Category 2 remuneration, approximately \$480,000 of which is sought in respect of the period of my appointment. The precise nature of the actual work carried out and its purpose or why it was necessary is unexplained.

*The basis for allocation*

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Inclusion of Feeder Funds in the allocation to the FMIF

60. In paragraph 79 of the affidavit, Mr Park states that the only assets of the LM Currency Protected Australian Income Fund (“CP-AIF”), and the LM Institutional Currency Protected Income Fund (“ICP-AIF”) are units in the FMIF, and that no allocation of remuneration to those funds has been made so as to avoid members of the CP-AIF and ICP-AIF being charged twice.
61. However, the material does not substantiate why costs incurred by the RE in administering the CP-AIF and ICP-AIF should be borne by the FMIF, rather than those funds, given work would still be required to be carried out for the administration of those funds.

Funds Under Management (“FUM”); Net Fund Value; and Capital Contributions

62. Paragraph 7(b) of the FAOA, with respect to the Category 2 Remuneration of Mr Park and Ms Muller as administrators of LMIM, seeks an allocation as between the Funds in proportion to the “capital contributed”.
63. Paragraph 10(b) of the FAOA, with respect to Category 2 Remuneration of Mr Park and Ms Muller as liquidators of LMIM, seeks an allocation as between the Funds in proportion to the “capital contributed”.
64. In paragraph 62(b) of the affidavit, Mr Park states that he seeks remuneration and the repayment of costs and expenses, “*where the work or expense relates to the funds management business generally, from each Fund proportionate to the respective funds under management.*”
65. Mr Park’s affidavit and the exhibits to it do not explain this relationship between the expressions “capital contributed” and “respective funds under management”.
66. The affidavit of Mr Park sets out, at paragraph 60, LMIM’s entitlement to fees, calculated on the basis of the percentage of the entitlement provided by the Constitution of each Fund, and the FUM of each Fund.

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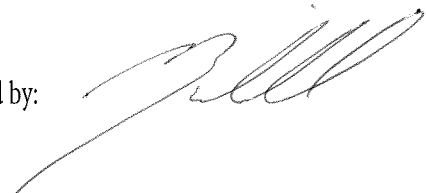


67. Clause 17.3 of the Constitution of the FMIF (see Exhibit "DW-1" at pages 345 to 409 of my July Affidavit) allows for a Management Fee of up to 5.5% to be charged by the RE of the FMIF.
68. The entitlement to management fees for each of the Funds is said to be calculated on the basis of Net Fund Value. Pursuant to the Constitution of the FMIF, Net Fund Value takes into account the liabilities of the FMIF, whereas the FUM may not.
69. The Product Disclosure Statement of the FMIF sets out a summary of the management costs to be charged to the FMIF. Page 23 of the PDS, states that the Manager (LMIM), will only receive a Management Fee of 2.3% per annum of net assets of the FMIF, and that the manager will waive its entitlement to the higher fee (5.5%).
70. Exhibited hereto and marked "DW-12" is the covering page, and page 23, of the Product Disclosure Statement of the FMIF.
71. In fact, at the time of the appointment of Mr Park and Ms Muller as administrators of LMIM, a management fee expressed to be calculated at 1.5% of the Net Fund Value (plus GST) was being charged by LMIM to the FMIF (being a management fee that LMIM as responsible entity was entitled to charge under the constitution of the FMIF) and paid to LMA under a services agreement.
72. According to the Constitution of the FMIF, any calculation of Management Fees paid from the FMIF should be made on the basis of Net Fund Value (clause 18.3 of the Constitution at page 372 of "DW-1").
73. The method of calculation outlined in the affidavit of Mr Park at paragraphs 69 to 79, appears not to be based on Net Fund Values.
74. The affidavit of Mr Park states that Mr Steve Hannan, an employee of LMIM, historically calculated the FUM. To my knowledge Mr Hannan's role was an investor relations and IT role, rather than an accounting role.

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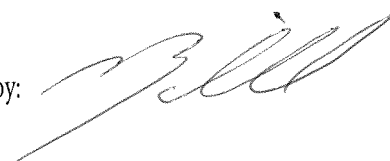
75. Although, Mr Hannan's calculation is said to be based on the book values of underlying assets of each Fund, obtained pursuant to asset valuations undertaken by LMIM from time-to-time, no such valuations are exhibited to the affidavit of Mr Park.
76. The value of the assets of the FMIF for the period from 19 March 2013 to 30 November 2013, according to the affidavit of Mr Park, is said to be between approximately \$276 million and \$279 million (page 592 of exhibit "JRP-1").
77. Following my appointment, and in conjunction with the DB Receivers, I arranged for valuations of the property charged to the FMIF to be carried out and prepared accounts based on those valuations for the financial year ending 30 June 2013. Those accounts are exhibited to my June Affidavit at page 272 of exhibit "DW-1". They were prepared by BDO in accordance with Australian Accounting Standards, and were reviewed by the BDO auditors.
78. The accounts for the year ending 30 June 2013, show a Net Fund Value of \$77 million as at 30 June 2013. I set out in the table below the Net Fund Value of the FMIF as stated in the accounts I directed to be prepared as part of my appointment (accounts for the half-year ended 31 December 2014 are exhibited to my June Affidavit at pages 272 to 344 of exhibit "DW-1"):-

Period	Net Fund Value
Year ended 30 June 2013	\$76,998,69
Half-year ended 31 December 2013	\$68,739,876
Year ended 30 June 2014	\$59,366,610
Half-year ended 31 December 2014	\$72,936,289
Year ended 30 June 2015	\$77,178,701

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79. The Net Fund Value contained in those accounts is calculated in accordance with International Financial Reporting Standards (“IFRS”). IFRS are a set of international accounting standards (adopted by Australia), that state how particular types of transactions and other events should be reported in financial statements.
80. Exhibited hereto and marked “DW-13” is a copy of the accounts for the year ended 30 June 2015.
81. In my view, it is not appropriate for an allocation of “Category 2” costs to be undertaken across all funds on the basis of a FUM apportionment. I refer to paragraph 97 of Mr Park’s affidavit in which he identifies the tasks considered to be Category 2 tasks. In my view, it was not necessary for Mr Park and Ms Muller and LMIM, to undertake after my appointment, work in connection with the FMIF of the kind described in paragraphs 97 (c) and (e) of Mr Park’s affidavit.
82. In respect of work of the kind described in paragraphs 97 (b), (d) and (f), Mr Park’s affidavit does not identify with sufficient detail the tasks undertaken in connection with the FMIF.
83. In respect of paragraph 97 (a), I dealt primarily with Mr Clout of LMA in relation to the books and records relating to the FMIF; I understand that in relation to books and records that the predominant proportion of work concerning the FMIF was completed by LMA. Insofar as any work undertaken by Mr Park and Ms Muller or LMIM, in connection with the books and records, related to the FMIF, the work should have been minimal for the reasons outlined above.

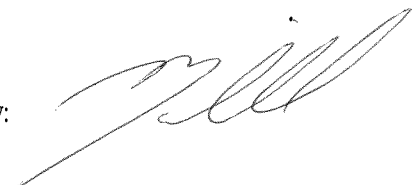
*LM Administration Pty Ltd (in liquidation) charges*

84. At paragraph 65 of the affidavit of Mr Park, he states that the ‘General Funds Management Remuneration and Expenses’ include “*claims for outlays incurred relating to work undertaken as part of the administration of LMA across the period 19 March 2013 to 26 July 2013*” and which were said to have been invoiced pursuant to the LMA Service Agreement. Mr Park states in paragraph 66 that tasks associated only with the services business of LMA have been invoiced by LMA to LMIM as RE of a fund, and LMIM in turn, is seeking remuneration as to this outlay in Category 2 Remuneration. These invoices appear in exhibit “JRP-1” at pages 829 to 836.

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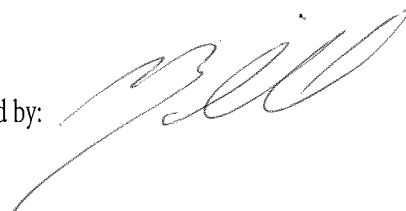


85. I refer in particular to the LMA invoices numbered 8973inv007 and 8973inv009, copies of which appear at pages 834 and 835 of exhibit JRP-1. It is not apparent from Mr Park's affidavit, nor have I been able to ascertain from my own investigations to date, whether those two invoices have been paid. I consider that to be a relevant question, given that those invoices refer to administrator's remuneration for work in LMA, which has been, in turn, invoiced in large part to the FMIF, and in relation to which Mr Park and Ms Muller now seek to be indemnified directly from the FMIF, by the FAOA (although I note that the invoices for Category 2 remuneration have been raised by LMIM).
86. The nature of the service fees charged by LMA to LMIM, on the basis of the description of the fees in the affidavit of Mr Park, appear to me to be charges that ought be treated as an expense of LMIM, rather than as a claim for remuneration by the FAOA.
87. On 26 July 2013, David Clout and Lorraine Smith were appointed liquidators of LMA. Prior to their appointment, according to the audited accounts for the FMIF for the financial years ended 30 June 2011 and 30 June 2012, LMIM paid LMA approximately \$11 million and \$9.1 million respectively for management services, and approximately \$5.4 million and \$4.8 million respectively for loan management and controllership services provided by the RE on behalf of the FMIF.
88. After the appointment of Mr Clout and Ms Smith, the DB receivers entered into an agreement with Mr Clout and Ms Smith to pay the expenses incurred in any given month as a result of LMA maintaining operations and answering queries as required in connection with the FMIF, plus 10% to cover the liquidator's remuneration and administration costs. Between July 2013 to June 2014, the 10% uplift fee totalled \$90,882.
89. Exhibited hereto and marked "DW-14" is a copy of a letter from the DB Receivers to LMIM dated 22 September 2014 and enclosures.
90. The letter, as well as identifying those payments to LMA, sought payment of expenses incurred by LMA which were funded by the FMIF, for operating costs to ensure LMA continued to operate.

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Witnessed by:



91. The basis of the apportionment of those invoices was reached in reliance upon employee timesheets. I understand that, following the appointment of Mr Clout and Ms Smith, LMA employees were directed to record time by fund. With respect to those payments by LMA that are for the benefit of multiple funds (the letter from the DB Receivers to LMIM uses the example of employee costs, building and utility payments), the allocation was based upon the time recorded by employees as against particular funds, as a percentage of total time recorded.

Management Fees

92. Pursuant to Clause 17.4 of the Constitution of the FMIF, the Responsible Entity is permitted to charge Management Fees, to a limit of 5.5% of the Net Fund Value of the FMIF, per annum. As mentioned above, the amount being charged at the time of the appointment of Mr Park and Ms Muller was 1.5%, and paid to LMA pursuant to the Services Agreements dated 1 July 2010 and 24 September 2012, exhibited to the affidavit of Mr Park at pages 35 to 53 of exhibit "JRP-1".

93. In paragraph 61 of the affidavit, Mr Park states that he has not charged any Fund a management fee since his appointment.

94. Following an interrogation of the AX Database (the system that houses and stores relevant records of the FMIF), I have obtained the following documents with respect to 'Management Fees':-

- (a) Invoice 1105 from LMIM to the FMIF in the sum of \$334,229.38 dated 31 March 2013;

Exhibited hereto and marked "DW-15" is a copy of that invoice.

- (b) Invoice 1111 from LMIM to the FMIF in the sum of \$334,633.91 dated 24 May 2013 (downloaded from the AX Database as a bundle with an email from Glenn O'Kearney to Eryn Vannucci);

Exhibited hereto and marked "DW-16" is a copy of that bundle.

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Witnessed by:



95. Exhibited hereto and marked "DW-17" are copies of recent letters from Tucker & Cowen Solicitors to Russells Lawyers, dated 11 January, 25 January and 17 February 2015 and sent on my instructions.
96. On 19 February 2016, Tucker & Cowen received a response from Russells to their letter of 17 February 2016; this letter is also exhibited at "DW-17".

Loan Management Fees

97. In addition to the Management Fees, LMA charged PTAL as custodian for the FMIF a 'Loan Management Fee'. The Loan Management Fees were charged in relation to individual loan files of funds, and charged out at an hourly rate for the staff of LMA. I understand that these fees ceased upon LMA entering into liquidation.
98. The Loan Management Fees were charged pursuant to separate agreements struck with respect to each distressed asset of the FMIF, or a controllership appointment.
99. I understand that the process entailed LMA invoicing for the Loan Management Fee, which was then indemnified by PTAL pursuant to the indemnity of the mortgagee's agent.
100. Exhibited hereto and marked "DW-18" is a copy of a Management Services Agreement entered into by PTAL, LMIM and LMA. This is an example of an agreement that the Loan Management Fees were charged pursuant to.
101. My interrogation of the AX Database also revealed the following documents:-

(a) With respect to 'Loan Management Fees':-

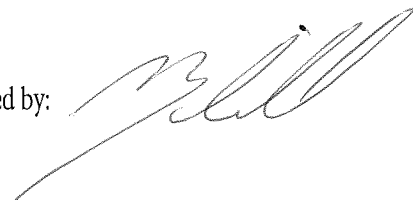
- (i) Invoice 1106 from LMIM to the FMIF in the sum of \$209,953.38 dated 31 March 2013;

Exhibited hereto and marked "DW-19" is a copy of that invoice.

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Witnessed by:



- (ii) Invoice 8973Inv004 from LMA to The Trust Company (PTAL) Limited (“PTAL”) as custodian of the FMIF dated 30 June 2013 (downloaded from the AX Database as a bundle of documents which also include Suncorp bank Internet banking statements, a schedule entitled “*FMIF Loans – Recovery Costs to 30 June 2013*”, and emails between FTI Consulting and LMIM staff).

Exhibited hereto and marked “DW-20” is a copy of that invoice.

- (iii) Invoice 8973Inv005 from LMA to PTAL as Custodian of the FMIF dated 25 July 2013 (downloaded from the AX Database with a schedule entitled “*FMIF Loans – Recovery costs to 25 July 2013*”).

Exhibited hereto and marked “DW-21” is a copy of that invoice.

- (iv) Invoice 8973Inv003 from LMA to PTAL as Custodian for the FMIF dated 31 May 2013 (downloaded from the AX Database with email correspondence between LMIM employees and FT Consulting).

Exhibited hereto and marked “DW-22” is a copy of that invoice.

102. Exhibited hereto and marked “DW-23” is a copy of the Second Report to Creditors of LMA from Mr Park and Ms Muller as administrators of the LMA.

Resource Fee

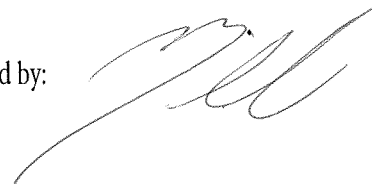
103. The affidavit of Mr Park, at paragraphs 19 and 65 to 67, explains the process whereby the fees charged by LMA to LMIM as RE of the FMIF, are carried through to be included as Category 2 Remuneration. Mr Park states that he and Ms Muller entered into a Services Agreement with LMA on 21 March 2013, following their appointment as administrators.

104. This Services Agreement provides for payment of a ‘Resources Fee’ to LMA. The Second Report to Creditors of LMA at Appendix 1 notes that in the period from 19 March 2013 to 30 June 2013, Resources Fees received totalled \$1,647,160.23.

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Witnessed by:



105. Mr Park mentions the amounts raised in two invoices to LMIM for a 'Resource Fee', and seeks to have them paid as a Category 2 Remuneration. Those invoices are exhibited at pages 834 and 835 of exhibit "JRP-1".
106. In the absence of the detail of how the resource fee is to be calculated it is not clear to me how, or whether, the amounts of the two 'Resource Fees' included in the affidavit of Mr Park, have been calculated in accordance with clause 4.2 of the Services Agreement.
107. As expenses apparently incurred by the RE of the FMIF, the invoices appear to me to be subject to the regime for claiming payment under LMIM's indemnity from the FMIF, the procedure for which is provided for in the regime of Justice Jackson by the orders made 17 December 2015.
108. During my interrogation of the AX Database I have obtained additional invoices for "Fund allocation of resource and business expenses" raised by LMIM to the FMIF. Exhibited hereto and marked as follows, are copies of each of those invoices:-
- (a) "DW-24": Invoice 8974inv12 dated 31 January 2013;
  - (b) "DW-25" Downloaded as one bundle from the AX Database (including Suncorp Bank internet banking statements and emails between FTI Consulting and LMIM staff):-
    - (i) Invoice 8974inv1 dated 30 June 2013; and
    - (ii) Invoice 8973 Inv002 dated 4 July 2013 raised by LMA to LMIM for the 'Resources Fee'
  - (c) "DW-26": Invoice 8974inv5 dated 26 July 2013 (together with an email from Simon Tickner to FTI Consulting staff)
  - (d) "DW-27": Downloaded as one bundle from the AX Database (including Suncorp Bank internet banking statements and emails between FTI Consulting and LMIM staff):-
    - (i) Invoice 8974inv8 dated 11 September 2013; and

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Witnessed by:



- (ii) Invoice 5429Inv001 dated 11 September 2013 raised by LMA to LMIM for the 'Resources Fee'
- (e) "DW-28": Invoice 8974inv16 dated 31 December 2013;
- (f) "DW-29": Invoice 8974inv18 dated 31 January 2014;
- (g) "DW-30": Invoice 8974inv20 dated 28 February 2014;
- (h) "DW-31": Invoice 8974inv22 dated 1 May 2014.

109. With respect to those invoices raised as 'Fund allocation of resource and business expenses', had the Net Fund Value of the FMIF, in accordance with the Management Accounts prepared by BDO and reviewed by BDO audit teams been utilised, I suspect the allocation to the FMIF would have been significantly less. I am unable to estimate what the reduction would likely have been because I am unaware of the Net Fund Value of the other Funds subject to the allocation.

Further documents obtained from the AX Database

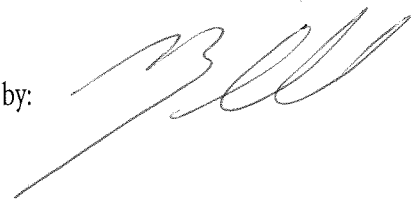
110. During my interrogation of the AX Database I also obtained the following documents:-

- (a) A ledger for account code 14000 entitled "Management fees pre-paid(payable)". I understand that this is the code with respect to management fees. There are a number of entries in that ledger that the affidavit of Mr Park does not address, and the documents I have been able to obtain from the AX Database do not explain. For example:-
  - (i) Entries dated 26 April 2013 and 6 May 2013 appear to be cash payments from the FMIF to LMIM;
  - (ii) There appear to be a number of Management Fees charged in the period, however, it seems that these fees have later been reversed; and

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- (iii) There appears to be an opening balance in that ledger account of an amount of \$560,722.62; and
  - (iv) It appears that Loan Management Fees paid have been set-off against that opening balance of pre-paid fees;
  - (b) An email from Simon Tickner to Eryn Vannucci, Francene Mulder and various members of FTI Consulting dated 8 July 2013.
111. Exhibited hereto and marked:-
- (a) "DW-32" is a copy of the ledger for account code 14000; and
  - (b) "DW-33" the bundle of emails including the email of Simon Tickner dated 8 July 2013.
112. Mr David Clout, the liquidator of LMA, reported to creditors on 4 December 2013. Exhibited hereto and marked "DW-34" is a copy of that report.
113. In that report, Mr Clout stated (on page 25), that the FMIF is an unsecured creditor of LMA to the amount of \$560,722.00. This is the opening balance to the management fee ledger exhibited above. In other words, an amount of \$560,722 had been paid by LMIM as RE for the FMIF to LMA in advance for services yet to be rendered; that was the position as at the date of the appointment of Mr Park and Ms Muller as administrators of LMIM, and Mr Clout reported (in his report to creditors mentioned above) that as being the position as at December 2013.
114. The material mentioned above in respect of the fees charged to the FMIF during the period prior to and during the appointment of Mr Park and Ms Muller as administrators of LMIM is not clear, so far as I have been able to ascertain, as to the demarcation between:
- (a) management fees charged to the FMIF;
  - (b) loan management fees charged by LMA to the FMIF;
  - (c) "resource fees" or service fees charged to the FMIF; and

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(d) expenses charged to the FMIF,


such that, including as a result of the charging, reversal and replacement of certain of those fees (as appears from the documents exhibited to this affidavit), there appears to me to be at least the possibility of duplication and lack of clarity in connection with the abovementioned fees charged and (at least in part) paid.

115. All the facts and circumstances above deposed to are within my own knowledge save such as are deposed to from information only and my means of knowledge and sources of information appear on the face of this my Affidavit.

Sworn by DAVID WHYTE on the 19<sup>th</sup> day of February 2016 at Brisbane in the presence of:



Deponent



Solicitor/A Justice of the Peace

SUPREME COURT OF QUEENSLAND

REGISTRY: Brisbane  
NUMBER: BS3508/2015

IN THE MATTER OF LM INVESTMENT MANAGEMENT LIMITED (IN LIQUIDATION)  
(RECEIVERS APPOINTED)  
ACN 077 208 461

First Applicant: JOHN RICHARD PARK AND GINETTE DAWN MULLER AS LIQUIDATORS  
OF LM INVESTMENT MANAGEMENT LIMITED (IN LIQUIDATION)  
(RECEIVERS AND MANAGERS APPOINTED) ACN 077 208 461 THE  
RESPONSIBLE ENTITY OF THE LM FIRST MORTGAGE INCOME FUND  
ARSN 089 343 288

AND

Second Applicant: LM INVESTMENT MANAGEMENT LIMITED (IN LIQUIDATION)  
(RECEIVERS AND MANAGER APPOINTED) ACN 077 208 461 THE  
RESPONSIBLE ENTITY OF THE LM FIRST MORTGAGE INCOME FUND  
ARSN 089 343 288

AND

Respondent: DAVID WHYTE AS THE PERSON APPOINTED TO SUPERVISE  
THE WINDING UP OF THE LM FIRST MORTGAGE INCOME FUND ARSN  
089 343 288 PURSUANT TO SECTION 601NF OF THE CORPORATIONS  
ACT 2001

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